

NO. 33654

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

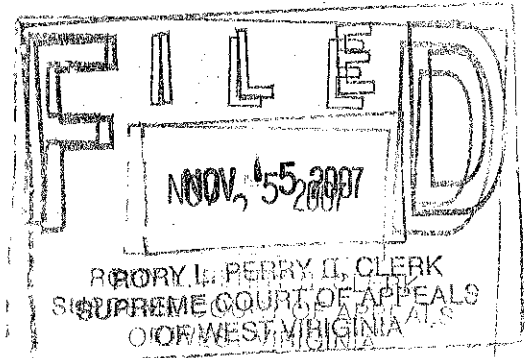
JEFFREY D. CARPENTER,

Appellee/Petitioner Below,

v.

F. DOUGLAS STUMP, Commissioner
of the West Virginia Division of Motor
Vehicles, and the STATE OF WEST
VIRGINIA,

Appellant/Respondent Below.



FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

JOSEPH CICCHIRILLO, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

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W. Va. Code §17C-5A-1(b)	
B. Any law-enforcement officer who fails to file the statements required by this chapter within forty-eight hours of the arrest of any person charged for any violation of section two, article five of this chapter or for any offense described in a municipal ordinance which has the same elements as an offense described in said section two of article five, shall be guilty of a misdemeanor and shall be subject to a fine of not less than twenty dollars nor more than five hundred dollars.	
W. Va. Code § 17C-5A-4	
C. If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section, and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or	

more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state. If the results of the tests indicate that at the time the test or tests were administered the person was under the age of twenty-one years and had an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state.

W. Va. Code 17C-5A-1(c). 6

- D. A law enforcement officer's failure to strictly comply with the DUI arrest reporting time requirements of W. Va. Code, 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor Vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure.

Syl. Pt. 1, *In re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999) 7

- E. [S]ubject matter jurisdiction means, generally, jurisdiction over the nature of the claim. Considering [W.Va.Code § 17A-2-9] in light of this general principle, it is apparent that this provision grants the Commissioner the authority, and therefore vests in him/her the subject matter jurisdiction, to "enforc[e] ... all laws the enforcement of which is now or hereafter vested in the department." The provisions of W.Va.Code § 17C-5A-1(c) require the Commissioner to enforce W.Va.Code § 17C-5-2, which prohibits driving under the influence of alcohol, controlled substances or drugs, by mandating that the Commissioner revoke the driver's license of individuals violating that section of the Code. Thus, the Commissioner's decisions under 17C-5A-1(c) are within the jurisdictional province of W.Va.Code § 17A-2-9 in that such decisions are rendered to enforce a law the enforcement of which is vested in the division. Therefore, we conclude that the Commissioner had the authority and the jurisdiction to consider the revocation of Coll's license to drive.

Coll v. Cline, 202 W. Va. 599, 505 S.E.2d 662 (1998) (footnote omitted) 7

- F. The submission of the arresting officer's affidavit was prompt, the minor delay was merely the result of his failure to attach the breathalyzer test results. We therefore conclude that no procedural due process violation resulted from the twenty week delay between Dolin's arrest for drunk driving and his notification that his license had been suspended by the Department of Motor Vehicles.

Dolin v. Roberts, 173 W. Va. 443, 446, 317 S.E.2d 802, 805 (1984) 8

- G. The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.

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Appellant/Respondent Below.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

Comes now the Appellant, Joseph Cicchirillo¹, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division") and the State of West Virginia, by counsel, Janet E. James, Assistant Attorney General, and submits this brief pursuant to an Order received from this Honorable Court on October 16, 2007, in the above-cited matter.

¹Effective October 17, 2005, Joseph Cicchirillo replaced F. Douglas Stump as Commissioner of the Division of Motor Vehicles.

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant seeks reversal of the *Opinion and Order Reversing Administrative Order* entered on February 22, 2007, by the Honorable Jennifer Bailey Walker, Judge of the Circuit Court of Kanawha County (hereinafter, "Order"), in an administrative appeal styled *Jeffrey D. Carpenter v. F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles, and the State of West Virginia*, Civil Action No. 04-AA-134. Through its Order, the Circuit Court reversed an administrative driver's license revocation order entered by F. Douglas Stump, Commissioner of the Division, by which Jeffrey D. Carpenter's (hereinafter, "Appellee") privilege to drive was revoked on October 4, 2004.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Appellee sought relief from the administrative order which took effect on October 4, 2004, (hereinafter, "Final Order"), wherein Commissioner Stump revoked Appellee's privilege to drive in West Virginia for a period of six months² for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the Final Order on the basis that "the administrative record contains no evidence to refute Petitioner's contention that the Division of Motor Vehicles failed to be fair and impartial to the Petitioner by, in effect, assisting the arresting officer to submit the proper paperwork to aid in the revocation process" and "the Division's actions in this matter violate the Petitioner's due process right to a fair and impartial hearing tribunal." Order at 3.

²The revocation continues in effect after the six month period until Appellee completes a Safety and Treatment Program and pays all pertinent fees and costs.

B. THE ADMINISTRATIVE PROCEEDING

Appellee was arrested on May 18, 2003, by Patrolman L.T. Taylor (hereinafter, "Ptlm. Taylor"), of the Charleston Police Department, for driving under the influence of alcohol (hereinafter, "DUI"). Ptlm. Taylor apprised the Division of Appellee's arrest by submitting the Implied Consent Statement and the Statement of Arresting Officer. The Implied Consent Statement was received by the Division on May 20, 2003, and the Statement of Arresting Officer was received on June 11, 2003.

After reviewing the Statement of Arresting Officer and its attachments, the Division issued an initial order³, dated June 13, 2003, revoking Appellee's privilege to drive in West Virginia for six months, with eligibility in ninety days, pending completion of the safety and treatment program and payment of the pertinent costs and fees.

On June 18, 2003, Appellee timely requested an administrative hearing. On July 1, 2003, the Division issued a notice of hearing to Appellee by which the administrative hearing was set for November 3, 2003. After two continuances, the hearing was held on July 12, 2004. The Final Order was issued on October 4, 2004⁴, reinstating the initial revocation for a period of six months.

Appellee filed a *Petition for Judicial Review* and a *Motion for Stay* on or about October 13, 2004. Following a hearing on or about November 11, 2004, Judge Walker granted a 150-day stay of the Appellee's license revocation. Appellee filed his brief on January 3, 2005. Appellant filed his brief on February 1, 2005.

³Record Exhibit 2.

⁴Record Exhibit 20.

Judge Walker then entered stay orders without prior hearing on March 29, 2005, July 29, 2005, August 30, 2005, October 3, 2005, November 2, 2005, December 6, 2005, January 9, 2006, February 13, 2006, April 10, 2006, May 18, 2006, August 18, 2006 and January 12, 2007.

On February 22, 2007, the circuit court entered its *Opinion and Order Reversing Administrative Order*, from which the Division seeks appeal.

II.

STATEMENT OF THE FACTS

On May 18, 2003, Ptlm. Taylor was patrolling the east end of Charleston around 2:47 in the morning when he observed a silver Land Rover driving southbound on Elizabeth Street without its headlights on. Transcript of Administrative Hearing held on July 12, 2004 at the DMV office in Kanawha County, Charleston, West Virginia at 10, 14 (hereinafter, "Tr. at 10, 14"). Ptlm. Taylor initiated a traffic stop. Appellee did not appear to realize that Ptlm. Taylor was attempting to stop him and did not appear to notice Ptlm. Taylor's lights and siren. Instead of yielding to the right, Appellee stopped his vehicle in the center lane at Washington and Greenbrier Streets. Tr. at 10. Ptlm. Taylor noticed an odor of an alcoholic beverage coming from Appellee's vehicle. Tr. at 11. Ptlm. Taylor asked Appellee for his driver's license, insurance and registration and Appellee appeared to have difficulty understanding what information was needed. Tr. at 11. Ptlm. Taylor asked Appellee if he had been drinking and Appellee stated that he had six or seven beers. Appellee had just left a club on Luther Street. Tr. at 11. Ptlm. Taylor asked Appellee to exit his vehicle to perform the standardized field sobriety tests. Appellee was unsteady exiting his vehicle, walking and standing. Tr. at 11. Once Appellee was out of his vehicle, Ptlm. Taylor detected the odor of alcohol coming from Appellee's person. Tr. at 11.

PtIm. Taylor was trained to administer field sobriety tests at the Police Academy. Tr. at 12. He administered the tests on a flat, level blacktop surface and there was artificial lighting. Tr. at 11. On the walk-and-turn test, Appellee was unable to remain steady while standing as PtIm. Taylor gave the instructions. Appellee also stepped off the line while walking, and took steps which did not touch heel to toe, with a distance greater than one inch. Tr. at 11. On the horizontal gaze nystagmus test, there was distinct nystagmus at maximum deviation, and a lack of smooth pursuit in both eyes. On the one-leg stand test, Appellee used his arms for balance, swayed while balancing and put his foot down. Tr. at 11-12. After failing the horizontal gaze nystagmus test, the one-leg stand test, and the walk-and-turn test, Appellee was arrested at 3:00 a.m. and transported to the station for processing. Tr. at 12.

At the station, PtIm. Taylor observed the Appellee for 20 minutes, and read the Implied Consent Statement to Appellee. Appellee signed the Implied Consent Statement. Appellee then submitted to the secondary chemical test by blowing on the Intoxilyzer 5000. Tr. at 12. PtIm. Taylor gave Appellee a copy of the printout ticket. Tr. at 13.

Exhibit 1 of the Administrative Record shows two envelopes by which the Statement of Arresting Officer was sent to the Division. One is postmarked May 19, 2003; the other June 10, 2003. Exhibit 1 consists of the aforementioned copies of envelopes; the Implied Consent Statement, marked received by the Division on May 20, 2003; the Statement of Arresting Officer, marked received by the Division on June 11, 2003; and the Intoxilyzer printout ticket.

PtIm. Taylor mailed the Implied Consent Statement to the Division on or before May 20, 2003. Tr. at 5. PtIm. Taylor also submitted a Statement of Arresting Officer within 48 hours of the arrest. Tr. at 7. He subsequently received a letter from the Division requesting another Statement

of Arresting Officer. Tr. at 7. On June 9, Ptlm. Taylor executed a Statement of Arresting Officer form, and submitted it to the Division. Record Exhibit1. The June 9, 2003 Statement of Arresting Officer was stamped as received by the Division on June 11, 2003. Tr. at 5-6.

III.

ASSIGNMENT OF ERROR

WHETHER THE CIRCUIT COURT ERRED IN REVERSING THE REVOCATION OF APPELLEE'S LICENSE ON THE BASIS THAT THE APPELLANT VIOLATED APPELLEE'S DUE PROCESS RIGHTS BY REQUESTING RESUBMISSION OF THE ARRESTING OFFICER'S STATEMENT.

IV.

POINTS AND AUTHORITIES

- A. Any law-enforcement officer arresting a person for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall report to the commissioner of the division of motor vehicles by written statement within forty-eight hours the name and address of the person so arrested.

W. Va. Code §17C-5A-1(b).

- B. Any law-enforcement officer who fails to file the statements required by this chapter within forty-eight hours of the arrest of any person charged for any violation of section two, article five of this chapter or for any offense described in a municipal ordinance which has the same elements as an offense described in said section two of article five, shall be guilty of a misdemeanor and shall be subject to a fine of not less than twenty dollars nor more than five hundred dollars.

W. Va. Code § 17C-5A-4.

- C. If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an

offense described in said section, and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state. If the results of the tests indicate that at the time the test or tests were administered the person was under the age of twenty-one years and had an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state.

W. Va. Code 17C-5A-1(c).

- D. A law enforcement officer's failure to strictly comply with the DUI arrest reporting time requirements of W. Va. Code, 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor Vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure.

Syl. Pt. 1, *In re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999).

- E. [S]ubject matter jurisdiction means, generally, jurisdiction over the nature of the claim. Considering [W.Va.Code § 17A-2-9] in light of this general principle, it is apparent that this provision grants the Commissioner the authority, and therefore vests in him/her the subject matter jurisdiction, to "enforc[e] ... all laws the enforcement of which is now or hereafter vested in the department." The provisions of W.Va.Code § 17C-5A-1(c) require the Commissioner to enforce W.Va.Code § 17C-5-2, which prohibits driving under the influence of alcohol, controlled substances or drugs, by mandating that the Commissioner revoke the driver's license of individuals violating that section of the Code. Thus, the Commissioner's decisions under 17C-5A-1(c) are within the jurisdictional province of W.Va.Code § 17A-2-9 in that such decisions are rendered to enforce a law the enforcement of which is vested in the division. Therefore, we conclude that the Commissioner had the authority and the jurisdiction to consider the revocation of Coll's license to drive.

Coll v. Cline, 202 W. Va. 599, 608, 505 S.E.2d 662,671 (1998) (footnote omitted).

- F. The submission of the arresting officer's affidavit was prompt, the minor delay was merely the result of his failure to attach the breathalyzer test results. We therefore conclude that no procedural due process violation resulted from the twenty week delay between Dolin's arrest for drunk driving and his notification that his license had been suspended by the Department of Motor Vehicles.

Dolin v. Roberts, 173 W. Va. 443, 446, 317 S.E.2d 802, 805 (1984).

- G. The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.

Syl. pt 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005).

V.

STANDARD OF REVIEW

This Court's review of this matter is controlled by the West Virginia Administrative Procedures Act. Review of legal questions is *de novo* (Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)); review of factual questions is guided by whether there is evidence on the record as a whole to support the agency's decision. This Court may reverse, modify or vacate the Order of the circuit court. W. Va. Code § 29A-5-4.

VI.

ARGUMENT

THE CIRCUIT COURT ERRED IN FINDING THAT THE DIVISION VIOLATED THE APPELLEE'S DUE PROCESS RIGHTS BY REQUESTING RESUBMISSION OF THE ARRESTING OFFICER'S STATEMENT.

The circuit court's opinion turned on the testimony of the arresting officer that although he initially submitted a Statement of Arresting Officer to the Division within 48 hours of the arrest, the

Division later asked him to submit another Statement of Arresting Officer. Judge Walker found that the Division thereby assisted the arresting officer in the revocation process, violating the Appellee's right to an impartial tribunal.

The circuit court erred in finding that the Division trampled the Appellee's rights by requesting resubmission of the Statement of Arresting Officer. The powers and duties of the Commissioner of the Division of Motor Vehicles are set forth in W.Va. Code § 17A-2-9 (a), which states in relevant part:

The commissioner shall observe, administer and enforce the provisions of this chapter and all laws the enforcement of which is now or hereafter vested in the department...

Whether it was the officer's failure to submit the Statement to the Division in a timely fashion or the Division's mis-placement of the Statement once it was received, the language of the statutes and the analyses in caselaw leave no question that the Division does not have the option of sitting on its hands when it has only partial information pertaining to an arrest. The Division is in no way divested of its mandate to revoke a license (W. Va. Code §17C-5A-1(c)) because of the officer's mis-steps in submitting the information (*In re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999)) or its own clerical error. *Coll v. Cline*, 202 W.Va. 599, 505 S.E.2d 662 (1998).

In the present case, the Division was clearly aware of the Appellee's arrest, having received, at a minimum, the Implied Consent Statement on May 20, 2004. The officer's testimony indicates that the Division probably also received the original Statement of Arresting Officer at that time. For reasons not apparent in the record, subsequent to the initial submission of documents, the Division asked Ptlm. Taylor to re-submit a Statement of Arresting Officer, which he did.

Once the Division was aware of the Appellee's arrest, it had an obligation to obtain all of the relevant paperwork to determine whether revocation of Appellee's license was appropriate. The

Code requires:

If, upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section, and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person was arrested he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.

W. Va. Code § 17C-5A-1(c) (italics added). The mandatory nature of this statute leaves no doubt that since the Division had the Implied Consent Statement, it would have been remiss had it *not* followed through with obtaining full paperwork. In *Coll v. Cline*, 202 W.Va. 599, 505 S.E.2d 662 (1998), this Court, through Chief Justice Davis, noted:

In the case *sub judice*, a secondary chemical test was administered; however, the arresting officer failed to submit the test results as required by W.Va.Code § 17C-5A-1(b). Without the test results, the Commissioner lacked the evidentiary foundation upon which to base her revocation of Coll's license. *While she could have attempted to correct the defect by returning the officer's written statement, see, e.g., Dolin v. Roberts*, she failed to do so in this instance.

202 W. Va. 610, 505 S.E.2d 673 (emphasis added). This Court clearly sent a message that the Commissioner is to be diligent about obtaining the necessary paperwork.

Statute requires the officer who makes a DUI arrest to report such arrest "to the commissioner of the division of motor vehicles by written statement within forty-eight hours." W. Va. Code §17C-5A-1(b). Indeed,

Any law-enforcement officer who fails to file the statements required by this chapter within forty-eight hours of the arrest of any person charged for any violation of section two, article five of this chapter or for any offense described in a municipal ordinance which has the same elements as an offense described in said section two of article five, shall be guilty of a misdemeanor and shall be subject to a fine of not less than twenty dollars nor more than five hundred dollars.

W. Va. Code §17C-5A-4. A reading of the mandates placed upon both the arresting officer and the Division following an arrest for DUI leaves no room for discretion in submitting and acting upon the officer's affidavit, including taking affirmative steps to obtain the Statement, as the Division did.

Had Ptlm. Taylor submitted the Statement of Arresting Officer three weeks later *without* being prompted by the Division, there would have been no question that the Division was obligated to pursue the revocation. In Syl. pt.1 of *In re Burks*, 206 W. Va. 429, 525 S.E.2d 310 (1999), this Court, through Chief Justice Starcher, stated:

A law enforcement officer's failure to strictly comply with the DUI arrest reporting time requirements of W. Va. Code, 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor Vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure.

Burks affirms, once again, the Commissioner's obligation to take jurisdiction of the matter and consider whether to revoke. Moreover, there was no finding in the present case that the Appellee was prejudiced by the approximately three-week delay in the Division's receipt of the Statement of Arresting Officer. Thus, an officer's noncompliance with the 48-hour reporting period does not deprive the Division of its jurisdiction to consider revoking a license.

We agree with the DMV that the 48-hour reporting duty in W. Va. Code, 17C-5A-1(b) [1994] is directed to and imposed on the arresting officer, and not on the DMV. We further recognized in *Coll v. Cline*, *supra*, and in *Dolin v. Roberts*, 173 W. Va. 443, 317 S.E.2d 802 (1984) that technical and nonprejudicial noncompliance with reporting time requirements that are imposed on a law enforcement officer was not a jurisdictional impediment to the DMV taking action regarding a license suspension.

Id. at 206 W. Va. 432, 525 S.E.2d 313. This Court has previously “concluded that the time requirements for filing the arresting officer’s statement applied only to the officer, and had no application to the Commissioner.” *Coll v. Cline*, 202 W. Va. 599, 606 n.12, 505 S.E.2d 662, 669 n.12 (citing *Dolin v. Roberts*, 173 W. Va. 443, 317 S.E.2d 802 (1984)).

More pertinently, this Court has affirmed the Commissioner’s practice of following up with the arresting officer to obtain full information in *Dolin*, *supra*, and *Coll*, *supra*. In *Dolin*, the officer who arrested Dolin submitted his statement to the Division in a timely⁵ fashion. 173 W. Va. at 444, 317 S.E.2d at 803. However, he failed to attach the results of the secondary chemical test, as required by W. Va. Code § 17C-5A-1(b). *Id.* The Division returned the affidavit to the arresting officer. *Id.* He subsequently re-submitted it with the secondary chemical test results attached. 173 W. Va. at 444, 317 S.E.2d at 804. As a result, there was a twenty week delay between arrest and issuance of the initial revocation order. *Id.*

Dolin sought a writ of prohibition against the Division based upon the twenty week delay. The Circuit Court of Boone County granted a writ of prohibition on the theory that the delay was

⁵Under the version of West Virginia Code section 17C-5A-1(b) in effect at that time, the arresting officer was required to report DUI arrests within twenty-four hours. *Dolin*, 173 W. Va. at 444-45, 317 S.E.2d at 804.

violative of both West Virginia Code § 17C-5A-1 (1983 Supp.) and Dolin's due process rights.

Dolin, 173 W. Va. at 445, 317 S.E.2d at 804-05. On appeal, this Court concluded:

The submission of the arresting officer's affidavit was prompt, the minor delay was merely the result of his failure to attach the breathalyzer test results. We therefore conclude that no procedural due process violation resulted from the twenty week delay between Dolin's arrest for drunk driving and his notification that his license had been suspended by the Department of Motor Vehicles.

173 W. Va. at 446, 317 S.E.2d at 805. Although this Court focused on the delay in issuance of the initial order of revocation, it made no finding that the Division acted improperly in asking the officer to re-submit the Statement with the chemical test results. In fact, in *Coll, supra*, the Court explicitly suggested that returning the Statement to the officer for correction would be proper.

In *Coll, supra*, the arresting officer failed to attach the Intoxilyzer ticket to his statement even though an Intoxilyzer test had been administered.⁶ Pursuant to W. Va. Code § 17C-5A-1(b), the arresting officer is required to submit "a copy of the results of any secondary tests of blood, breath or urine," when reporting a DUI arrest to the Division.

The *Coll* Court determined that the Commissioner was not divested of jurisdiction by the arresting officer's failure to comply with the statutory requirement that he submit the secondary chemical test results with the Statement of Arresting Officer. Syl. Pt. 5, *Coll, supra*. In its opinion, this Court found that although it was error for the Division to have issued the initial revocation order in the absence of the secondary chemical test results, it harmless error in light of the fact that the Intoxilyzer test results were admitted at the administrative hearing. 202 W. Va. at 607, 505 S.E.2d at 670. An "error which is not prejudicial to the complaining party is harmless and does not require

⁶The *Coll* case differed from *Dolin* in that the Division did not return the statement to the officer but issued an initial revocation order in the absence of the Intoxilyzer ticket.

reversal of the final judgment." *Coll*, 202 W. Va. at 610, 505 S.E.2d at 673 (citations omitted) (quoting Syl. pt. 5, *Miller v. Board of Educ. of County of Boone*, 190 W. Va. 153, 437 S.E.2d 591 (1993)).

The circuit court erroneously focused on the administrative hearing process which *follows* issuance of an initial order of revocation. The circuit court's finding that the Division's obligation is to provide a "fair and impartial hearing tribunal" (Order at 3) illustrates the overreaching by the circuit court. This matter is confined to the initial submission of paperwork upon which the Division must determine whether to revoke; not to the subsequent administrative hearing.

Appellee has been afforded all of the due process safeguards discussed, as follows, in *Jordan v. Roberts*, 161 W. Va. 750, 755-56, 246 S.E.2d 259, 262 (1978) (quoting *North v. Board of Regents*, 160 W. Va. 248, 257, 233 S.E.2d 411, 417 (1977)):

"[A] formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings."

The *Jordan* Court analyzed the administrative license revocation process under the foregoing *North* standards and concluded that the proceedings comported with due process. *Jordan*, 161 W. Va. at 756, 246 S.E.2d at 263. Application of the *North* standards to the instant appeal must lead to the same conclusion.

As the *Jordan* Court noted, the initial revocation order provides notice to the licensee. *Id.* This order specifically apprised Appellee that his privilege to drive was being revoked because the Division was in receipt of "a written statement . . . certifying that on May 18, 2003 the officer had reasonable grounds to believe that you were driving a motor vehicle in this state while under the

influence of alcohol." Record Exhibit 2. It further advised Appellee that he had the right to contest the revocation. Record Exhibit 2. Appellee took advantage of this right and submitted a written request for an administrative hearing. Record Exhibit 3.

Pursuant to Appellee's written request, the Division scheduled an administrative hearing. Record Exhibit 4. After two continuances, the administrative hearing was held on July 12, 2004. Therefore, Appellee was afforded "sufficient opportunity to prepare to rebut the charges." At the hearing, Appellee was represented by his retained counsel, in conformity with the *North* requirements. *Jordan*, 161 W. Va. at 755-56, 246 S.E.2d at 262. A review of the transcript of the administrative hearing reflects that although Appellee was not present, Appellee through his counsel, was able "to confront his accusers, and to present evidence on his own behalf" before an "unbiased hearing tribunal." *Id.* Further, the transcript constitutes an "adequate record of the proceedings." *Id.* Thus, all of the *North* requirements have been met.

This Court has been clear that in the absence of fraud or bad faith, clerical errors in the submission of the initial documents to the Division following a DUI arrest can be forgiven. In *Johnson v. State Department of Motor Vehicles*, 173 W. Va. 565, 318 S.E.2d 616 (1984)(per curiam) the appellee argued that the revocation of his license was "made upon unlawful procedures" because the certificate of service on the arresting officer's affidavit reflected that it had been mailed four hours before the time it was notarized. The only explanation offered for this discrepancy at the hearing was innocent mistake on the part of the notary in indicating the time.

In considering what effect, if any, this error had upon the revocation, the *Johnson* Court noted that the

arresting officer's affidavit substantially met all the requirements of the statute. It contained all the information necessary to enable the

Commissioner to make her determination of whether to institute license revocation proceedings, and there is no dispute that the affidavit was properly sworn to, as shown on the face of the jurat.

Johnson, 173 W. Va. at 571, 318 S.E.2d at 621. Further, "there [was] no allegation or proof of bad faith or fraud." *Id.* Therefore, the *Johnson* Court concluded that the error did not constitute grounds for reversal. *Id.* Similar reasoning should control the disposition of this matter.

In the present case, the circuit court's decision does not comport with the public policy upon which DUI laws are predicated, namely protecting the innocent public from dangerous drivers. The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible. Syl. pt 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). The Division's actions in this matter were consistent with this public policy.

The circuit court erred in finding that the Appellee's due process rights were violated. The Division took proper steps to remedy the fact that the original Statement of Arresting Officer could not be found. The Division acted in accordance with its mandate to review the Statement of Arresting Officer and determine whether to issue a revocation order. Further, the circuit court's Order was overreaching in its concentration on the requirement of a "fair and impartial hearing tribunal," when there is no dispute that Appellee was given a full hearing. The clerical error made in this case, which did not prejudice the Appellee, is not properly the basis for subverting the public policy of this State to remove intoxicated drivers from the roads.

VII.

RELIEF REQUESTED

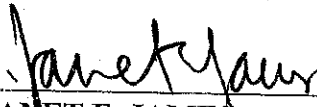
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, Appellant hereby prays that the Order entered by the Circuit Court of Kanawha County on February 22, 2007, reversing the Final Order entered by the Commissioner on October 4, 2004, be reversed and vacated, and remanded with directions to affirm the Final Order.

Respectfully submitted,

**JOSEPH CICCHIRILLO, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES, AND THE STATE OF WEST
VIRGINIA,**

By counsel,

**DARRELL V. McGRAW, JR.
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NO. 33654

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFREY D. CARPENTER,

Appellee/Petitioner Below,

v.

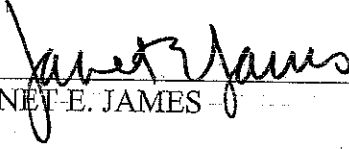
F. DOUGLAS STUMP, Commissioner
of the West Virginia Division of Motor
Vehicles, and the STATE OF WEST
VIRGINIA,

Appellant/Respondent Below.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellant* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 15th day of November, 2007, addressed as follows:

Patrick L. Cottrell, Esquire
Suite 712, Security Building
100 Capitol Street
Charleston, WV 25301



JANET E. JAMES